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APR 2

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1931

EX PARTE: THE STATE OF COLORADO, PETITIONER

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

SUPPLEMENTAL BRIEF OF THE PETITIONER

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JURISDICTION

The respondents in the briefs to show cause why the petition of the State of Colorado should not be filed, and in response to show cause why the writ of mandamus should not issue, admit that the jurisdiction of this Court is invoked under Section 234 of the Judicial Code (U. S. C., Title 28, Section 342).

STATUTE INVOLVED

Section 33 of the Judicial Code, as amended, is set out in full upon pages 49 and 50 of the original brief of the petitioner. The portion of the statute applicable to the instant case is

quoted on pages 2 and 3 of the briefs of the respondents.

OPINION BELOW

The opinion of the Hon. J. Foster Symes, Judge of the United States District Court for the District of Colorado, is printed in full as an appendix on pages 15 to 25 to the brief for the respondents in support of the response to the rule to show cause why leave to file the petition for a writ of mandamus should not be granted.

It can serve no useful purpose to discuss the opinion of the Court below. Suffice it to say that the Court has erroneously construed the application of Section 33 of the Judicial Code. The Court referred to the publicity given to the case. In the appendix (page 25 of the respondent's brief) the Court stated that "agitation and unfair publicity by the local papers" was comparable with an "unwarranted agitation and inflamed and unreasoning public opinion" in the Mooney and Sacco-Vanzetti cases. All of which is beside the question involved and indicates that the Court was more concerned with newspaper publicity, rather than with the application of the law to the petition of the defendant.

The writ of certiorari and habeas corpus cum causa issued by the Court (Ex. A, on page 24, of motion for leave to file petition for writ of mandamus) clearly indicates the same is inconsistent with the opinion rendered by the Court.

The writ sets forth, among other things, that the said Henry Dierks "showeth in his said peti-

tion at the time of the alleged offense, he was an officer and employee of the United States Government, employed as a United States Prohibition Agent, assigned to the District of Colorado, *and acting by his authority and by virtue of such did the act complained of.*" The opinion as set forth in the appendix (page 23 of respondent's first brief) states that all that is necessary is a prima facie showing that the act was "done under color of his office." We are unable to reconcile the petition, the writ and the opinion.

As stated in the original brief of the petitioner at the top of page 10—"The State has made ample provision by law for a defendant to secure a change of venue to another county where local prejudice exists against the individual." (Sec. 6617, Compiled Laws of Colorado, 1921). A defendant who has violated the law of the state under such circumstances, as charged in the information in the instant case, is entitled to no greater consideration than any other person similarly situated, regardless of his official character. The State desires that only justice be done and a fair and impartial trial had.

ARGUMENT

COLOR OF OFFICE

The respondents upon page 4 of their briefs state, as follows:

> "It was not essential under the removal statute that the petition show that the act

> charged against the petitioner as an offense was justified by his official duty."

This statement is in direct conflict with and contrary to the law as announced by the late Chief Justice Taft in the case of *Maryland v. Soper* (No. 1), 270 U. S. 9, 46 Sup. Ct. 185, 70 L. Ed. 449, where it is said at page 33:

> "(3) It must appear that the prosecution of him, for whatever offense, has arisen out of *the acts done by him under color of federal authority* and in enforcement of federal law, *and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty.*" (Italics ours, original brief of petitioner, page 10.)

Counsel for the respondents made the same argument in the case of *Maryland v. Soper, supra,* and cited many of the same cases, as set out in their briefs in the instant case (See Maryland v. Soper, 70 L. Ed. 452, and briefs in the case).

A complete answer to the argument of the respondents as to the meaning and application of the phrase "on account of any act done under color of office," contained in Section 33 of the Judicial Code, will be found on pages 9, 10 and 11 of petitioner's original brief.

Counsel have attempted to give to the expression "on account of any act done under color of his office" an evil and corrupt meaning, as applied to the removal statute. All of the cases

cited in their briefs are civil suits, based upon alleged civil liability under official bonds, writs and processes.

The courts from time to time have attempted to distinguish between acts *virtute officii* and acts *colore officii,* as applied to liability upon official bonds. As stated in the case of *Feller v. Gates,* 91 Am. St. Rep. 511:

> ". . . The distinction suggested has been productive of anything but harmony among the authorities, and in its attempted application to particular cases it has served to confuse rather than to clarify. It is a distinction hard to make in theory, and even more difficult to apply in practice. Not only do the courts differ as to the liability of the sureties for acts colore officii, but among those authorities which agree that such acts are covered by the obligation of the bond, the most widely divergent views are entertained as to what constitute acts 'colore officii' within the meaning of the definition.
>
> "While, therefore, the cases are full of discussions concerning the distinction between acts done by virtue and those done under color of office, the distinction is 'of little practicable application' . . . and the apparent conflict 'exists rather in the application and use of terms than the principles enunciated': (citing cases)
>
> ". . . the preponderance of authority holds the sureties on an official bond liable where the acts were done colore officii: (citing cases) . . ."

The general trend of authority to sustain liability upon official bonds where acts are committed under "color of office" is aptly expressed in the case of *Wieters v. May, et al.*, 71 S. C. 9, 50 S. E. 547, at 549, as follows:

> "The lawful acts of an officer, of course, can create no liability whatever; but if an officer, a state constable, while attempting to execute some duty of his office, abuses or exceeds his authority, or executes it in an unlawful manner, to the injury of another, his bond is liable. To illustrate: If a state constable in an attempt to discharge a duty to his office, in the seizure of contraband liquor of the arrest of one openly violating the dispensary law, should, without just excuse, commit an assault and battery, or if, in overcoming resistance, he should so exceed his duty as to become the aggressor in an assault and battery, to the injury of another, then there is liability upon his bond. But an assault and battery committed by a constable under a bald assumption and usurpation of authority, without process or authority of any kind, would not be covered by the terms of his bond. These conclusions are not only the result of our own cases, but are supported by the general trend of authority in other jurisdictions, among which we cite the following: (citing cases) . . ."

Likewise, criminal responsibility under such circumstances, as announced in the above case, is the law of Colorado.

In *Campbell v. People*, 55 Colo. 302 at 308 (cited on page 23 of the original brief of the petitioner), it is said:

> "When a peace officer takes a human life in circumstances which the law does not justify, he cannot take shelter behind his character, and claim that he was acting in his official capacity.
>
> ". . . The unjustified use of an instrument on a part of the body of one killed thereby in a manner calculated to take human life tends *to prove malice aforethought of the slayer.*"

Section 6793, Compiled Laws of Colorado, 1921 (page 25, original brief), provides:

> ". . . Any officer or person whatever, that may or shall assault or beat any individual under color of his commission or authority, without lawful necessity so to do, shall, on conviction, suffer the same punishment."

The phrase "color of office" as applied to the removal statute can only be interpreted to give it the significance of good faith under "Color of Right." As stated in 11 C. J., page 1227, "Color of Right" is—

> "An honest belief in a state of facts which, if it existed, would be a legal justification or excuse; such semblance or appearance of right as shows that the right is really in dispute."

See also Note 41, 11 C. J. page 1227.

In the case at bar, the defendant Henry

Dierks has failed to set forth a state of facts which shows that there is a legal justification for the act committed, and that his acts and conduct were justified by his Federal duty.

We cannot find any authority to sustain government counsel that the phrase "on account of any act done under color of his office" carries with it an evil and sinister intent, as applied to the removal statute.

A casual reading of Section 85 of the Criminal Code (U. S. C., Title 18, Section 171, cited on page 6 of respondent's second brief) clearly shows criminal liability for every officer who commits the crime of extortion under color of his office, etc. Crimes are not committed by virtue of the office. It is only under some pretense or false claim by one who occupies the office or who claims to occupy the office that there arises the question of extortion. Such pretense or false claim, or color of claim, has no bearing upon the "color of office," as applied to the removal statute. It is impossible for us to reconcile a false claim, malice, a malignant and abandoned heart with the "color of right," as applied to the removal statute.

Counsel for the respondents (page 4 of their second brief) state:

> "The allegations of the petition clearly negative the possibility that at the time he dealt the blow which resulted in the death of the deceased the petitioner was acting outside the scope of his official duties. The blow was struck in attempt-

> ing to make an arrest under color of office."

If a literal interpretation of the definition of "colore officii" cited by counsel in the case of *Alcock v. Andrews,* 2 Espinasse 542 (page 7 of their second brief) were accepted, then they must admit that the blow was struck without authority and that Dierks was not to be considered as an officer in doing the act complained of.

Counsel have evidently overlooked or ignored the significant allegation in the petition of the defendant Henry Dierks, to-wit, that "the act for which he was, and is, informed against, was performed while he was engaged in the discharge of the duties of his office as United States Prohibition Agent, and while he was acting by and under the authority of the Internal Revenue laws of the United States, *and was done under and by right of his office,* to-wit, as United States Prohibition Agent." (Italics ours.) (Ex. A, page 19, motion for leave to file petition for writ of mandamus.) There is not the slightest reference in the petition to any claim that what the defendant did was "on account of any act done under color of his office."

Section 33 of the Judicial Code (Appendix, pages 49-50, original brief of petitioner) provides, among other things:

> "When any . . . criminal prosecution is commenced in any court of a State against any officer appointed under or

> acting by authority of any revenue law of the United States now or hereafter enacted . . . *or on account of any right or authority claimed by such officer* . . . the said . . . prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court . . ." (Italics ours.)

We have deleted the clause, towit, "on account of any act done under color of his office" so that the "claim of right" such as is set out in the petition of the defendant Henry Dierks will be apparent to the Court.

We feel that counsel for the respondents have been lost in a maze of their own diction and confusion in attempting to explain the meaning of the expression "on account of any act done under color of his office," as applied to the removal statute. Were it not for the apparent confusion, we would have been content to leave the subject without comment.

SUMMARY

1. The petition for removal has failed to meet any of the requirements as announced by Chief Justice Taft in the case of *Maryland v. Soper,* 270 U.S. 9, 70 L. Ed. 449 (pages 9, 10, 11, petitioner's brief).

2. The petitioner Henry Dierks has failed, conformably to the rules of good pleading, to make the case upon which he relies, because the petition is based upon conclusions and recitals, contrary to the opinion of Mr. Justice Van De-

vanter in the case of *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U. S. 146 (page 39, petitioner's original brief) and other authorities (pages 40, 41, 42 and 43, petitioner's original brief).

CONCLUSION

The case of *Maryland v. Soper, supra*, is decisive of the question involved in this proceeding.

Counsel for the State of Colorado contend that the petitioner Henry Dierks has failed to meet all of the requirements of law and to justify his acts or conduct as a federal officer in committing the act alleged in the information.

We, therefore, contend that the petition is insufficient, in law or otherwise, to constitute a defense of immunity from punishment by the State of Colorado, and that a writ of mandamus should issue as prayed for in the petition.

Respectfully submitted,

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DENVER, COLORADO, APRIL, 1932.

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